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(19)

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 345 of 2005

APPELLANT Smt. Rukshana Bee @ Durga aged about 32/33 years, wife of Shri Nasir Khan, resident of Mohara Bajrang Nagar, Rajnandgaon (Chhattisgarh)

Versus

RESPONDENT State of Chhattisgarh

(Appeal under Section 374(2) of Cr.P.C.)

Appearance:

Shri Avinash Mishra, counsel for the appellant.
Shri Arun Sao, Govt. Advocate, for the State.

JUDGMENT
(09.07.2007)

Sunil Kumar Sinha, J.

(1) Being aggrieved with the judgment of conviction and order of sentence dated 09.3.2005 passed in Special Case No.19/2004 by the Special Judge (NDPS Act), Bastar at Jagdalpur, whereby the appellant was convicted u/s 20(b)(ii)(B) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short The NDPS Act) and sentenced to undergo R.I. for 5 years and to pay a fine of Rs.10,000/-, in default of payment of fine, to further undergo R.I. for 2 years, she has filed this criminal appeal.

(2) The brief facts are that on an information received by the Sub-Inspector M.B.Patel (P.W.4), regarding bringing of Ganja from Orissa through a passenger Bus by a lady, he went to Dhanpunji Check Post after making relevant entries in

Rosnamcha Sanha. He was accompanied by Head Constable Panchuram and constables No.208, 210, 328 & 392. When the said Bus came over there, the lady was identified who told her name as Ruksana Bee @ Durga (present appellant). She was carrying a jute bag in which the contraband, Ganja in quantity of 4.500 Kgs. was there. After compliance of necessary provisions of NDPS Act, it was seized in presence of two Panch witnesses namely Shyamlal (P.W.2) & Bal Singh (P.W.3). The article was sealed and two separate packets containing 30 – 30 grams each were also sealed for the purpose of sampling. The accused along-with the material was brought to the Police Station and a First Information Report (Ex.P.19) was registered u/s 20-(b) of the NDPS Act vide Crime No.46/2004 on 20.3.2004. Thereafter, the seized Ganja was kept in the *Malkhana* for which an entry was made through Ex.P.1(C). Further one packet of sample was sent for its chemical examination to Forensic Science Laboratory, Raipur, through memo of Superintendent of Police dated 21.3.2004 (Ex.P.25) from where a report dated 10.5.2004 (Ex.P-2) was received, according to which also, the material sent for examination was Ganja.

(3) The accused/appellant was charged with section 20(b)(ii)(B) of the NDPS Act, which was denied by her. After examination of the prosecution witnesses, her statement u/s 313 Cr.P.C. was recorded, in which, vide question nos.15, 16,

17, 33 & 34, she admitted the seizure of Ganja from her possession in quantity of 4.500 Kgs.

(4) The Special Court convicted the appellant on the basis of testimony of Investigating Officer i.e., Sub-Inspector M.B. Patel (P.W.4), taking support from those portions of evidence of *Panch* witnesses, in which, they have stated about search and seizure of Ganja from the possession of the appellant as also her admissions made in the examination u/s 313 Cr.P.C. regarding recovery of Ganja from her possession.

(5) Learned counsel for the appellant raised the grounds that the Panch witnesses have turned hostile and the version of Sub-Inspector M.B. Patel (P.W.4) is not fully reliable and the conviction based upon his testimony taking aid and support from the admissions made by the appellant in her accused statement is not in accordance with law. On the basis of entry in *Malkhana* register, he also submitted that the sample sent for examination does not appear to be one which was seized from the possession of the appellant, therefore, report of the chemical examiner is of no use to the prosecution.

(6) On the other hand, learned State Counsel opposed these arguments and supported the judgment of conviction and order of sentence passed by the Special Court.

(7) M.B. Patel (P.W.4) has deposed regarding the information received by him and also regarding making entry in *Rosnamcha* before departure to the place of seizure. According to his version

when the lady was searched in presence of Panch witnesses, it was found that she was holding the possession of Ganja in quantity of 4.500 Kgs. in a jute bag, which was possessed by her. The seizure memo (Ex.P.9) was prepared in presence of two panch witnesses namely Shyamlal (P.W.2) and Bal Singh (P.W.3) and two separate packets of 30-30 grams were also prepared from the said article and the remaining article alongwith the samples were sealed vide Ex.P.13.

(8) Though Shyamlal and Bal Singh have been declared hostile by the prosecution, but they have supported the version of the investigating officer to the extent that ganja was seized from the possession of the appellant and they had signed the document to this effect. Shyamlal (P.W.2) has deposed that when he was sitting at Dhanpunji Naka alongwith his friend Bal Singh (P.W.3) who was the Nakedar, Sub-Inspector M.B. Patel came over there alongwith police staff and remained there for about half an hour. Thereafter, he checked the Bus coming from Orissa and caught the accused who was holding a bag. When the bag was checked by the Police, they found Ganja in it. He deposed that some document to this effect was also prepared by the Police on which he had put his signature. He has been declared hostile by the prosecution on the ground as he stated that other documents were not prepared at the place of occurrence as they were signed in the police station. Almost, similar evidence has been given by Bal Singh (P.W.3), who was the Nakedar of the said check post where the passenger bus was

stopped and checked. He also deposed that the accused was got down by the police from the said Bus and when her bag was checked by them, certain article was found in it which was told to be Ganja by the Police. The police has prepared certain document at the place of checking on which he had put his signature.

(9) Firstly, learned counsel for the appellant had argued that the contents of document Ex.P.13 would show that total 3 packets were prepared by the police, out of which two packets were containing 30-30 grams of seized material and according to the said memo, last packet should have contained 4.440 Kgs. of ganja whereas the entry of *Malkhana* register, proved as Ex.P.1(c), would show that the 3rd packet was containing 4.500 Kgs. of ganja. His argument was that if the total quantity of 4.500 Kgs. of ganja was kept in the third packet in *Malkhana* then from where the two packets of 30-30 grams (total 60 grams) were brought by the police, out of which one was sent for chemical examination. According to him, this entry of *Malkhana* register creates doubt on the testimony of investigating officer and no conviction can be based upon it.

(10) I have carefully examined the contents of *Malkhana* register. The entry has been made in the said register that 3 packets were deposited there, out of which, one packet was containing 4.500 Kgs. of ganja and 2 other packets were containing 30-30 grams of ganja and 4th packet was containing 7 currency notes of Rs.10/- denomination. About contraband,

P.W.4 has deposed in para 11 that he had prepared 3 packets of Ganja, among them, two packets were containing 30-30 grams and the remaining material was kept in the 3rd packet. In the cross examination vide para 33 & 34, he has deposed that it was not that 4.560 Kgs. of ganja was kept in *Malkhana* but in fact, total 4.500 Kgs. of ganja was kept there and samples of 30-30 grams were prepared from the total quantity of Ganja i.e., 4.500 Kgs. seized from the possession of the appellant. Hence, from the evidence of the investigating officer, it can not be said that either the packet sent for chemical examination was not prepared from the article seized from the possession of the appellant or it was brought from somewhere else and deposited in *Malkhana*, because, there is a clear entry in the memo Ex.P.13 that 3 packets were prepared from the contraband seized from the possession of the appellant. The entry of *Malkhana* register appears to be a mistaken entry which cannot be made basis to destroy the testimony of the investigating officer, which appears to be trustworthy in light of other evidence on record.

(11) The second argument advanced by learned counsel for the appellant was about the support taken by the Special Court from the admissions made by the appellant in her statement u/s 313 Cr.P.C. His contention was that the statement of the accused recorded u/s 313 Cr.P.C. is not an evidence and no conviction can be based on it. He referred to the two decisions of the Apex Court rendered in the matter of ***Bhalinder Singh –***

vs- State of Punjab, 1994 (II) M.P.Weekly Notes (43) S.C. & Devender Kumar Singla –vs- Baldev Krishan Singla, 2004 (2) Bilaspur Law Journal 213 (SC). In Bhalinder Singh's case (supra), the Apex Court said in context of section 313 Cr.P.C., that the prosecution has to establish its case and stand on its own legs. Weakness of the defence cannot be used as a circumstance in favour of the prosecution. Further in case of Devender Kumar Singla (supra) it was said by the Apex Court that the statement of the accused u/s 313 is not evidence, it is stand or version of accused by way of explanation, when incriminating materials appearing against him are brought to his notice.

(12) These are the old settled principles of law about which, there is no dispute. But it cannot be said that the admissions made by the accused regarding incriminating circumstances appearing in evidence against him, that means inculpatory admissions, shall altogether be ignored. The Apex Court held in the matter of ***State of U.P. –vs- Lakhmi 1998 Cri.L.J.1411*** that "The need of law for examining the accused with reference to incriminating circumstances appearing against him in prosecution evidence is not for observance of a ritual in a trial, nor is it a mere formality. It has a salutary purpose. It enables the Court to be apprised of what the indicated persons has to say about the circumstances pitted against him by the prosecution. Answers to the questions may sometimes be flat denial or outright repudiation of those circumstances. In certain

cases accused would offer some explanations to incriminative circumstances. In very rare instances accused may even admit or own incriminating circumstances adduced against him, perhaps, for the purpose of adopting legally recognized defences. In all such cases the Court gets the advantage of knowing his version about those aspects and it helps the Court to effectively appreciate and evaluate the evidence in the case. If an accused admits any incriminating circumstances appearing in evidence against him there is no warrant that those admissions should altogether be ignored merely on the ground that such admissions were advanced as a defence strategy".

(13) Therefore it is clear that a conviction of the accused cannot be based solely on the statement recorded u/s 313 Cr.P.C., as it is not an evidence, but the same cannot be brushed aside out rightly by ignoring it and it has to be considered in conjunction with the other evidence on record.

(14) Learned counsel for the appellant had tried to argue that if the admissions are to be considered, then they can be considered as a whole and not as a part so as to prejudice the case of the accused. This argument can also not be accepted in view of the decision of the Apex Court in the matter of ***Mohan Lal and another –Vs- Ajit Singh and another AIR 1978 S.C. 1183*** in which approving the earlier judgment recorded in the matter of ***Nishi Kant Jha –vs- State of Bihar AIR 1969 422 SC*** it held that if the evidence on the record disproves the exculpatory part of the statement of accused in the trial Court, it

is clearly permissible to accept that part of the statement which accords with the evidence on the record, and to act upon it.

(15) Therefore, it is further clear that examination of the accused u/s 313 Cr.P.C. is not a mere formality and answers given by the accused during such examination are important and useful in criminal trial as apart from affording an opportunity to the accused to explain incriminating circumstances against him, the result of such examination is helpful to the Court in appreciating the evidence adduced in the court during the trial and to come to a particular conclusion regarding the guilt of the accused. It is also permissible to the Court to take into account even the inculpatory statements ignoring the exculpatory statements if it accords with the evidence on record and to press it to the arena of appreciation.

(16) In the present case, the Special Court has taken into account the statement made by the accused u/s 313 Cr.P.C. in which she admitted the factum of seizure of ganja from her possession. Not only in one question she has made admission, but in answers to many questions she has made various admissions regarding her such possession. On question no.15, 16, 17, 33 & 34 her answers are as follows:

> प्र.15 साक्ष्य में आया है कि उसके बाद आपके जूट के झोले की तलाशी लेनेपर उसमें गांजा जैसा पदार्थ मिला जिसका तलाशी एवं बरामदगी पंचनामा बनाया गया जो प्र.पी. 8 एवं प्र.पी. 9 है । आपका क्या कहना है ?
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> उ. सही है ।

प्र.16 साक्ष्य में आया है कि आपके जूट के झोले से प्राप्त पदार्थ को जलाकर, सुधारकर गवाहों से पहचान कराने पर गवाहों ने बताया कि वह गांजा है । पहचान पंचनामा प्र.पी. 10 है । आपका क्या कहना है ?

उ. सही है ।

प्र.17 साक्ष्य मे आया है कि उक्त गांजा को आरक्षक शिवाजी त्रिपाठी ने तौला तो उसका वनज 4 किलो 500 ग्राम होना पाया गया तौल पंचनामा प्र.पी. 11 है आपका क्या कहना है ?

उ. सही है ।

प्र.33 उपनिरीक्षक एम.बी. पटेल ने आपके खिलाफ बयान क्यों दिया है ?

उ. मेरे पास से गांजा जब्त हुआ था ।

प्र.34 राज्य न्यायालयिक विज्ञान प्रयोगशाला की परीक्षण रिपोर्ट प्र.पी. 2 के बारे मे आपका क्या कहना है ?

उ. मेरे पास से गांजा जब्त हुआ था ।

(17) On appreciation, the Special Court has considered the version of the investigating officer to be true and even on the face of entry in the *Malkhana* register, his testimony has not been disbelieved considering the inculpatory admissions made by the accused in her examination u/s 313 Cr.P.C., as above.

(18) There appears to be no infirmity in the finding recorded by the court below on the above material on record and the same cannot be faulted with. There is no substance in the arguments advanced by learned counsel for the appellant. The appeal has no merits and the same is dismissed.

Sd/-
SUNIL KUMAR SINHA
Judge

Rao